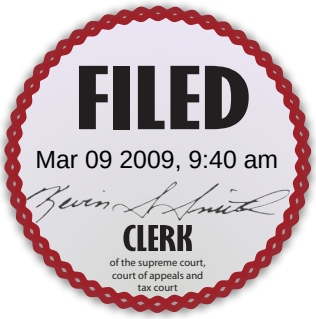

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IN THE
COURT OF APPEALS OF INDIANA

KEVIN P. DAVIS and LISA F. DAVIS,	)	
	)	
Appellants-Plaintiffs,	)	
	)	
vs.	)	No. 64A03-0805-CV-239
	)	
DRAKE BUILDERS LTD.,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Roger V. Bradford, Judge
Cause No. 64D01-0508-PL-7415

March 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Kevin and Lisa Davis obtained a judgment against Drake Builders, Ltd. At all times relevant to this action, Robert Von Dracek[1] was president and majority shareholder of Drake, which is a closely held corporation. The Davises initiated proceedings supplemental to enforce their judgment against Drake, and they named Von Dracek as a garnishee-defendant, arguing the corporate veil should be pierced to hold Von Dracek liable for Drake's debt. The trial court found in favor of Von Dracek, and we affirm.

FACTS AND PROCEDURAL HISTORY

February 6, 2000, the Davises and Von Dracek (as president of Drake) signed a purchase agreement for Lot 16 in Whitethorne Woods. The Davises had plans to build a four-bedroom house on that lot. The purchase agreement was conditioned on the Davises receiving a well and septic permit. The Davises agreed to pay Drake to do the work necessary to obtain the permit.

The Porter County Health Department sent Drake a fax concerning the permit for Lot 16. It was addressed to Alan Frechette, a Drake employee. A handwritten note at the bottom of the document reads, "Please note slopes in area of SBs taken 2/28/00 appear to be greater than 15%. If slopes are greater than 15%, then this site is <u>not</u> <u>suitable</u> for any septic system." (Plaintiff's Ex. 6) (emphases in original). The note is signed by Mary Cavnah and dated March 2, 2000. This fax was never shown to or discussed with the Davises.

[1] We note several different spellings of Von Dracek's name in the record. We will use the spelling that appears in his brief. Some documents provided by the Davises at trial and on appeal are captioned as if there is only one plaintiff and appellant rather than two, *e.g.*, "Brief of Appellant." We will refer to the documents as the Davises captioned them

For reasons not apparent in the record, Drake obtained a residential septic permit for Lot 16 despite the problems with the slopes on the property. On May 24, 2000, Von Dracek faxed the Davises a copy of the permit. The parties closed on May 26, 2000. Von Dracek signed the settlement statement as president of Drake.

The Davises, who previously lived in Virginia, did not immediately begin building their house, because Kevin was busy establishing his business in Indiana. The Davises were ready to begin building in the fall of 2004, but the septic permit had expired by then. They reapplied and were denied.

On August 31, 2005, the Davises filed a complaint against Drake, alleging they would not have purchased the property if Drake had informed them the property was not suitable for any kind of septic system. On April 4, 2007, the trial court found for the Davises on theories of fraud and constructive fraud and entered a monetary judgment against Drake.

On December 12, 2007, the Davises filed a motion for proceedings supplemental. The motion alleged Von Dracek was at all relevant times the president and majority shareholder of Drake, Drake was the alter ego of Von Dracek, and the corporate veil should be pierced to hold Von Dracek liable for the judgment against Drake. Von Dracek was joined as a garnishee-defendant. On February 28, 2008, the trial court heard arguments from the Davises and Von Dracek.

On March 12, 2008, the trial court issued an order in which it declined to pierce the corporate veil and hold Von Dracek personally liable. The trial court noted that *Aronson v. Price*, 644 N.E.2d 864 (Ind. 1994), lists eight factors that could be considered

in determining whether the corporate veil should be pierced. The trial court found the only factor "potentially applicable here is 'fraudulent representation by corporation shareholders or directors.'" (Appellant's App. at 1.) The trial court reviewed its judgment of April 4, 2007 and found Von Dracek was not mentioned in any of the findings of fact or conclusions of law. The trial court also reviewed the trial exhibits and determined they did not connect Von Dracek to Drake's fraud:

> The exhibits signed by [Von Dracek] as president of [Drake] include the original purchase agreement, the closing statement, a fax transmittal regarding septic and well permit and a proposal. . . . A review of those exhibits shows that the promise made by [Von Dracek] to [the Davises] was that he would obtain a well and septic permit for the lot they were purchasing from [Drake]. Those exhibits further show that [Drake] did, in fact, obtain a well and septic permit for said lot. The evidence in the case is that [the Davises] allowed that permit to expire and then were denied a permit when they reapplied. The fraud found by the Court in entering its judgment in favor of [the Davises] occurred thereafter and is the subject of findings of fact previously referred to which mention Alan Frechette as an employee of [Drake].

(*Id*.)

DISCUSSION AND DECISION

The Davises raise four issues, which we consolidate and restate as whether the trial court erred by declining to pierce the corporate veil and hold Von Dracek liable for Drake's debt.[2]

[2] The trial court rejected the Davises' argument that their case was analogous to *Gable v. Curtis*, 673 N.E.2d 805 (Ind. Ct. App. 1996):

> In that case, Curtis, who was the president, director and shareholder of the Defendant corporation was sued in his individual capacity. The trial court granted summary judgment for Curtis in his individual capacity and the Court of Appeals reversed, holding that Curtis, as a corporate officer could be held liable if he personally participated in the fraud being claimed by Plaintiff. That is not the situation in the case at bar. [Von Dracek] was never a party to this action and, as recited above, there was never any finding that he personally participated in the fraud found by the Court.

Neither brief contains a standard for our review.[3] *See* Ind. Appellate Rule 46(A)(8)(b) ("The argument must include for each issue a concise statement of the applicable standard of review. . . ."). It appears the trial court entered findings of fact and conclusions of law *sua sponte*. Under such circumstances, the findings and judgment will not be set aside unless clearly erroneous. *Piles v. Gosman*, 851 N.E.2d 1009, 1012 (Ind. Ct. App. 2006). A judgment is clearly erroneous if there is no evidence supporting the findings, the findings do not support the judgment, or the wrong legal standard was applied. *Id*. While we review findings of fact for clear error, we do not defer to the trial court's conclusions of law, which we review *de novo*. *Id*.

> A trial court's findings control only the issues they cover, and we will apply a general judgment standard to any issues about which the court did not make findings. "We may affirm a general judgment based on any legal theory supported by the evidence."

Id. (citations omitted).

The party seeking to pierce the corporate veil bears the burden of proving "the corporate form was so ignored, controlled or manipulated that it was merely the

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(Appellant's App. at 1-2.)

The Davises understand this part of the trial court's order to hold that proceedings supplemental are not an appropriate vehicle for raising the issue of piercing the corporate veil, and they argue as their first issue that the trial court erred in so holding. They rely on *Apollo Plaza Ltd. v. Antietam Corp.*, 751 N.E.2d 336 (Ind. Ct. App. 2001), where we upheld the trial court piercing Apollo's corporate veil during proceedings supplemental to enforce Antietam's judgment against Alex Shirieav. Apollo argued on appeal that it was not a properly named party, but we held it had waived the issue because it had not objected in the trial court. Our opinion cited *Abbey Villas Development Corp. v. Site Contractors, Inc.*, 716 N.E.2d 91, 102 (Ind. Ct. App. 1999), *trans. denied* 735 N.E.2d 231 (party may not claim error in trial procedure when it acquiesces in that procedure).

Von Dracek correctly notes *Apollo* was vacated; our Supreme Court granted transfer and then dismissed the appeal as moot. 764 N.E.2d 641 (Ind. 2002). We caution counsel for the Davises to verify that cases cited in briefs are good law. However, counsel for the Davises did note *Apollo's* reliance on *Abbey Villas*, which is still good law. As Von Dracek has offered no other argument on this issue and the trial court addressed the merits of the Davises' arguments at any rate, we will also address the merits.

[3] Nor does the Davises' brief contain a statement of facts. *See* App. R. 46(A)(6) (appellant's brief shall contain a statement of facts).

instrumentality of another and that the misuse of the corporate form would constitute a fraud or promote injustice." *Aronson*, 644 N.E.2d at 867.

> In deciding whether a plaintiff has met this burden of proof, an Indiana court considers whether the plaintiff has presented evidence showing: (1) undercapitalization; (2) absence of corporate records; (3) fraudulent representation by corporation shareholders or directors; (4) use of the corporation to promote fraud, injustice or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; or (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form.

Id.

The trial court found, and the Davises do not dispute, that only the third factor is potentially relevant. The Davises argue Von Dracek can be held personally liable for Drake's judgment if he personally participated in the fraud. *See Gable v. Curtis*, 673 N.E.2d 805, 809 (Ind. Ct. App. 1996) ("It is well-settled that a corporate officer cannot escape liability for fraud by claiming that he acted on behalf of the corporation when that corporate officer personally participated in the fraud.").

The Davises argue they established Von Dracek's personal participation in the fraud because he was the only person to communicate with the Davises on behalf of Drake and because he signed many of the documents exchanged between the Davises and Drake. We disagree. The only evidence Drake knew about problems with the permit was the fax from Cavnah to Frechette. We agree with the Davises that Frechette's involvement in obtaining the permit does not necessarily insulate Von Dracek from liability; however, it cannot be inferred from the mere existence of the fax that Von Dracek was aware of its contents. Von Dracek promised to obtain a septic permit and he

obtained one. There is no evidence he was alerted to any irregularities in the permit. As there was no evidence Von Dracek personally participated in the fraud, there was no basis for the trial court to pierce the corporate veil, and its judgment was not erroneous.

Affirmed.

FRIEDLANDER, J., and BRADFORD, J., concur.